Supreme Court, U.S.

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No. 97-

In the

Supreme Court of the United States

October Term, 1997

MICHAEL KREMETIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

PETITION FOR WRIT OF CERTIORARI.

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July 31, 1997

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42 pp

QUESTION PRESENTED FOR REVIEW.

Whether the First Circuit Court of Appeals ruled contrary to this Court's decision in *United States* v. *Lopez*, 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995) in holding that Congress did not exceed its authority under the Commerce Clause in enacting 21 U.S.C. §§ 841 and 846.

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PETITION FOR WRIT OF CERTIORARI.

The petitioner Michael Kremetis ("Kremetis") respectfully prays that a writ of certiorari issue to review so much of the judgment of the United States Court of Appeals for the First Circuit, entered on June 27, 1997, as denied his petition for rehearing and suggestion for rehearing en banc.

OPINIONS BELOW.

The opinion and judgment of the United States Court of Appeals for the First Circuit in *United States* v. *Kremetis*, No. 96-1319 (Slip Op., September 19, 1996) rehearing denied (June 27, 1997) is reproduced in the Appendix.

JURISDICTION.

The judgment of the United States Court of Appeals for the First Circuit, affirming the petitioner's conviction, was entered on September 19, 1996. Represented by different counsel, the petitioner filed a suggestion for rehearing en banc on May 6, 1997. The court below entered an order denying the petition for rehearing and suggestion for rehearing en banc on the merits on June 27, 1997. [Appendix 25a-26a]. This petition is filed within ninety (90) days of that date. The petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(l).

CONSTITUTIONAL PROVISIONS.

The petitioner contends that the drug statutes under which he was charged (21 U.S.C. §§ 841 and 846) violated the Commerce Clause of the United States Constitution. Art. 1, § 8, cl. 3 of the United States Constitution provides as follows:

> Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States and with the Indian Tribes.

STATEMENT OF THE CASE.

A. *Relevant Procedural History.*

On May 25, 1995, a Federal grand jury in the District of New Hampshire delivered a twenty-five count indictment charging the defendant Michael Kremetis and four others on various drug related offenses. After his arrest, he was arraigned before U.S. Magistrate Judge Eugene W. Bealieu. He entered a plea of not guilty and was ordered detained pending further court action.

On or about September 20, 1995, the grand jury handed down a superseding indictment charging the defendant and two others with drug related offenses. The superseding indictment named the defendant in sixteen of its nineteen counts. It alleged, in part, that the defendant and the two named codefendants had conspired to possess or distribute crack cocaine in Manchester, New Hampshire between March and June of 1995. The defendant entered a not guilty plea before U.S. Magistrate Judge James R. Muirhead on September 25, 1995.

On or about October 2, 1995, the defendant filed a motion to dismiss the superseding indictment on the grounds that under this Court's decision in *United States* v. *Lopez*, 514 U.S. 549, ___, 115 S.Ct. 1624, 1634, 131 L.Ed.2d 626 (1995), Congress exceeded its authority under the Commerce Clause in enacting 21 U.S.C. §§ 841 and 846. The defendant argued that both sections were unconstitutional on their face and were therefore unenforceable against him. He further argued that the superseding indictment was fatally flawed in that it did not allege that any of the conspiratorial activities alleged therein substantially affected interstate commerce. The District Court (DiClerico, J.) denied the motion to dismiss in an order dated November 14, 1995.

On November 17, 1995, the government filed an amended motion to dismiss Counts Three and Six through Nineteen. Thereafter, the government proceeded to trial on Counts One, Two, Four and Five, all alleging conspiracy to distribute and to possess with intent to distribute cocaine and crack cocaine in violation of 21 U.S.C. §§ 841(a)(1) and 846.

Trial commenced before Judge DiClerico and a jury on November 27, 1995 in the United States District Court in Concord, New Hampshire. On November 30, 1995, following a four day trial, the defendant was found guilty on Counts One, Four and Five. He was found not guilty on Count Two.

On March 4, 1996, Judge DiClerico sentenced the defendant to concurrent terms of 210 months on the three indictments. The defendant filed a timely notice of appeal. On September 19, 1996, a three judge panel from the First Circuit Court of Appeals (Boudin, Aldrich, and Lynch, JJ.) affirmed the defendant's conviction in an unpublished decision.

As noted above, the Court of Appeals denied the petitioner's suggestion for rehearing en banc on the merits on June 27, 1997.

The District Court had jurisdiction over this case pursuant to 18 U.S.C. § 3231, which vests in the United States District Courts jurisdiction over offenses against the laws of the United States.

The Appeals Court had jurisdiction over the petitioner's appeal pursuant to 28 U.S.C. § 1291, which vests in the United States Courts of Appeals jurisdiction of appeals from all final decisions of the District Court.

B. *Summary Of Facts.*

For purposes of this petition, the petitioner will adopt the brief discussion of facts (in the light most favorable to the

government), which is set forth in the opinion of the panel that heard his direct appeal:

> Michael Kremetis owns the Eggs and Things restaurant in Manchester, New Hampshire. Among the "Things" sold there were rocks of cocaine base. At least three cocaine dealers plied their wares from the restaurant. Kremetis was convicted of conspiring with the drug dealers to distribute and to possess with intent to distribute cocaine and cocaine base, in violation of 21 U.S.C. §846. He was acquitted on one count asserting a drug conspiracy with an alleged fourth dealer. [Slip Opinion at 2, Appendix 19a].
>
> . . . . . .
>
> The jury would have been amply justified in finding that Kremetis was an active member of the drug conspiracies and was paid by the dealers for his involvement. Kremetis introduced the undercover agent and other buyers to the dealers when they said they wanted to buy cocaine; Kremetis negotiated the terms of some deals, including the quantities of drugs and the prices;

> Kremetis knew the quantities of drugs the dealers had available; Kremetis indicated he could get the drugs for the agent in the future "for a better price"; Kremetis indicated to the drug dealers when it was acceptable for him to deal; Kremetis attempted to safeguard the drug deals from police notice. Kremetis also said that he made more profit from many sales of small quantities of drugs than from fewer sales of larger quantities. One dealer refused to discuss the sale of drugs in Kremetis's absence. Kremetis once boasted, "My name is golden with the drug dealers around here," and even acknowledged, "Because I know what is going on here and I allow it, I could go to jail, too." This was not, as Kremetis argues, an example of his merely being present while others engaged in drug dealing. It was, as the government says, a situation where Kremetis offered "take-out" drug service from his restaurant. [Slip Opinion at 5, Appendix 21a].

REASONS FOR GRANTING THE WRIT.

I. CONSIDERATION BY THIS COURT IS WARRANTED WHERE THE FIRST CIRCUIT RULED CONTRARY TO THIS COURT'S DECISION IN *UNITED STATES* V. *LOPEZ*, 514 U.S. 549, 115 S.CT. 1624, 131 L.ED.2D 626 (1995).

As the petitioner argued on appeal, the drug statutes under which he was charged (21 U.S.C. §§ 841 and 846) violated the Commerce Clause and therefore should have been declared unconstitutional under principles set forth in *United States* v. *Lopez*, 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995).

With little discussion or meaningful analysis, the panel rejected the petitioner's Commerce Clause challenge. For the reasons set forth below, the petitioner contends that his challenge should have been allowed and that by denying the petitioner's claim, the First Circuit failed to follow settled precedent from this Court.

This Court has long acknowledged that "[t]he scope of [the commerce] power must be considered in the light of our dual system of government and may not be extended so as to embrace effects on interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37, 57 S.Ct. 615, 624, 81 L.Ed. 893 (1937). As Justice Powell explained, "federal overreaching under the Commerce Clause undermines the constitutionally mandated balance of power between the States and the Federal Government, a balance designed to protect our fundamental liberties." *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528, 572, 105 S.Ct. 1005, 1028, 83 L.Ed.2d 1016 (1985) (Powell, J., dissenting).

Notwithstanding these principles, prior to 1995, the Court routinely and summarily rejected Commerce Clause challenges to a variety of Federal statutes. See *United States* v. *Wall*, 92 F.3d 1444, 1446 (6th Cir. 1996). "For the first time in over fifty years, however, the Supreme Court [in *Lopez*] invalidated a federal statute because Congress had exceeded its authority under the Commerce Clause." *Id.*, citing *United States* v. *Lopez*, 514 U.S. at ___, 115 S.Ct. at 1634.

In *Lopez*, five justices concluded that constitutional principles of federalism limit the extent to which the Commerce Clause may be interpreted as a grant of plenary power. *United States* v. *Lopez*, 514 U.S. at 115 S.Ct. at 1626-1634. The majority went on to identify three categories of activities that

Congress may regulate under its commerce power: (1) "the use of the channels of interstate commerce"; (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities"; and (3) "those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce." *Id.* at ___, 115 S.Ct. at 1629-30 (citations omitted).

In the instant case, Congress passed a statutory scheme that addresses a purely local issue — one which is the subject of state statutes enforced by local authorities. Accordingly, Congress exceeded its authority under the Commerce Clause. Indeed, any connection between the activity addressed by 21 U.S.C. §§ 841 and 846 and interstate commerce is tenuous at best. While there may be instances in which, incidental to a drug conspiracy, the channels or instrumentalities of interstate commerce are used, "[o]ur Constitution quite properly leaves such matters to individual States, notwithstanding these activities' effect on interstate commerce." *Lopez*, 514 U.S. at 115 S.Ct. at 1642 (Thomas, J., concurring).

In fact, the main effects of the activity charged in both this case and perhaps in the majority of controlled substance cases were purely local. That is, the sales were confined to a very specific location within the State of New Hampshire, the participants charged were local people, and the end users of the controlled substances were also local people. The petitioner does not dispute that the sale and use of drugs can have a serious adverse impact on society. However, he contends that that impact bears no more than a passing relationship to interstate commerce. Moreover, while crime in general and drug activities in particular may be perceived as national problems, they are in truth local issues that can and should be addressed at the state level.

Exacerbating the problem is the aggressive enforcement of the statutes by Federal law enforcement officials, disregarding the ability of state and local officials to address this issue. As noted above, the New Hampshire Legislature has made the very same activity illegal, and local and state police have directed substantial resources toward combating the sale and use of illegal drugs. In these circumstances, the Federal government's overreaching smacks of paternalism. It also intrudes into the constitutional authority of the state and threatens the delicate balance between Federal and state authority.

The principles set forth in *Lopez* have been used to invalidate a number of Federal statutes where the connection between the activity and interstate commerce was tenuous. *See, e.g., United States* v. *Pappadopoulos*, 64 F.3d 522, 527 (9th Cir. 1995) (receipt of natural gas from out-of-state source was insufficient to confer federal jurisdiction for arson conviction); *United States* v. *Olin Corp.*, 927 F. Supp. 1502, 1522-32 (S.D. Ala. 1996) (holding that *Lopez* prohibits the application of CERCLA liability); *Hoffman* v. *Hunt*, 923 F. Supp. 791, 807 (W.D.N.C. 1996) (declaring that 18 U.S.C. § 248, the Freedom of Access to Clinic Entrances Act, was an invalid expression of Congressional power); *United States* v. *Mussari*, 894 F. Supp. 1360, 1363-64 (D.Ariz. 1995) (the Child Support Recovery Act, 18 U.S.C. § 228, which punished the failure to pay child support, was an unconstitutional exercise of congressional power). In this case, and in a typical case alleging a drug conspiracy, the interference is no less substantial, and the connection to interstate commerce is no less tenuous. The petitioner submits that Congress has exceeded its authority in enacting 21 U.S.C. §§ 841 and 846 and that the enforcement of those sections by Federal law enforcement officials was equally offensive.

Although the principles set forth in *Lopez* appear to be clear on their face, the message does not seem to have reached the

courts below. Thousands of defendants are prosecuted every year under these statutes even though the charged conduct is punishable under local law in every jurisdiction. In view of the widespread use of the challenged statutes by the government and the extent of the intrusion into the states' domain, the issue raised here is one of great importance. Accordingly, the petition should be allowed.

CONCLUSION.

Based on the authorities cited and the reasons stated above, the defendant-appellant respectfully requests that his petition be allowed.

Respectfully submitted,

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By his attorney,

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APPENDIX A.

United States District Court
District of New Hampshire

UNITED STATES OF AMERICA JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After
v. November 1, 1987)
Case Number: 1:95CR00068-001
Michael Kremetis Paul J. Haley, Esq.
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s)_____
☐ pleaded nolo contendere to count(s)_____
☒ was found guilty on count(s) 1S, 4S, and 5S
after a plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 U.S.C. § 846	**Conspiracy to Distribute and to Possess with Intent to Distribute Cocaine and Cocaine Base**	05/31/1995	1S, 4S, 5S

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☒ The defendant has been found not guilty on count(s) 2S
☒ Count(s) 3S,6S, 7-10S, 12-18S are dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment as fully paid.

Defendant's Soc. Sec. No.: 001-60-7811
Defendant's Date of Birth: 01/08/1953
Defendant's USM No.: 01456-049
Defendant's Residence Address:
225 Witford Street
Manchester NH 03101
Defendant's Mailing Address:
225 Witford Street
Manchester NH 03101

03/04/1996
Date of Imposition of Judgment

/s/
Signature of Judicial Officer

Joseph A. DiClerico, Jr.
Chief Judge, US District Court
Name and Title of Judicial Officer

3-8-96
Date

DEFENDANT: Michael Kremetis
CASE NUMBER: 1:95CR00068-001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 210 month(s).

210 months on each count of 1S, 4S and 5S to run concurrently with each other

☐ The court makes the following recommendations to the Bureau of Prisons:

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ a.m./p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
Deputy U.S. Marshal

DEFENDANT: Michael Kremetis
CASE NUMBER: 1:95CR00068-001

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 5 year(s). 5 years to run on each count 1S, 4S and 5S to run concurrently with each other

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

☐ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

☐ The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restititution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page (if indicated below).

See Special Conditions of Supervision - Sheet 3.01

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquires by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questions by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency with the permission of the court;
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: Michael Kremetis
CASE NUMBER: 1:95CR00068-001

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall provide the probation officer with access to any requested financial information.

DEFENDANT: Michael Kremetis
CASE NUMBER: 1:95CR00068-001

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals	**$150.00**	**$**	**$**

☐ If applicable, restitution amount ordered pursuant to plea agreement . . . . . $_____

FINE

The above fine includes costs of incarceration and/or supervision in the amount of $_____.

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ The interest requirement is waived.
☐ The interest requirement is modified as follows:

RESTITUTION

☐ The determination of restitution is deferred in a case brought under Chapters 109A, 110, 110A and 113A of Title 18 for offenses committed on or after 09/13/1994, until _____. An Amended Judgment in a Criminal Case will be entered after such determination.

☐ The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

Name of Payee	**Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
Totals	$_____	$_____	

** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994.

DEFENDANT: Michael Kremetis
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SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A ☒ in full immediately; or
B ☐ $ _____ immediately, balance due (in accordance with C, D, or E); or
C ☐ not later than _____; or
D ☐ in installments to commence _____ day(s) after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule if appropriate; or
E ☐ in _____ (*e.g. equal, weekly, monthly, quarterly*) installments of $_____ over a period of _____ year(s) to commence _____ day(s) after the date of this judgment.

The National Fine Center will credit the defendant for all payments previously made toward any criminal monetary penalties imposed. Special instructions regarding the payment of criminal monetary penalties.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments are to be made to the United States Courts National Fine Center, Administrative Office of the United States Courts, Washington, DC 20544, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program. If the National Fine Center is not operating in this district, all criminal monetary penalty payments are to be made as directed by the court, the probation officer, or the United States attorney.

DEFENDANT: Michael Kremetis
CASE NUMBER: 1:95CR00068-01

STATEMENT OF REASONS

☐ The court adopts the factual findings and guideline application in the presentence report.

OR

☒ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

See Additional Factual Findings and Guideline Application Exceptions - Sheet 6.01

Guideline Range Determined by the Court:

Total Offense Level: 37
Criminal History Category: I
Imprisonment Range: 210 to 262 months
Supervised Release Range: 3 to 5 years
Fine Range: $20,000.00 to $4,000,000.00

☒ Fine waived or below the guideline range because of inablity to pay.

Total Amount of Restitution: $ _____

☐ Restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need

to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(d).

☐ For offenses that require the total amount of loss to be stated, pursuant to Chapters 109A, 110, 110A, and 113A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment of any amount of restitution order, and do not allow for the payment of any or some portion of a restitution order in the foreseeable future under any reasonable schedule of payments.

☐ Partial restitution is ordered for the following reason(s):

☐ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines.

OR

☒ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

Based on the quantity of drugs determined by the court, the low end of the range is a reasonable sentence.

OR

☐ The sentence departs from the guideline range:

☐ upon motion of the government, as a result of defendant's substantial assistance.

☐ for the following specific reason(s):

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ADDITIONAL FACTUAL FINDINGS AND GUIDELINE APPLICATION EXCEPTIONS

The Court finds that the Base Offense Level is 32 based on the weight of 50-150 grams of cocaine base attributed to the defendant. The Court also adjusted upward 3 levels instead of 4 levels pursuant to U.S.S.G section 3B1.1(b) for the defendant's Role in the Offense.

The defendant objected to the drug weight attributable to him in paragraphs 17, 18, 19, and 26 of the Presentence Report ("PR"). The court found that the quantity attributable to the defendant is between 50 and 150 grams by considering the 15 grams about which there was direct evidence in the case and approximately 42 grams based on a consideration of the testimony of other witnesses including Mr. Colon concerning drug-related activities at Eggs and Things during the time frame in question. The court indicated that it was satisfied by a preponderance of the evidence that the quantity attributable to the defendant was between 50 and 150 grams. This results in a base offense level of 32 instead of 34.

The defendant objected to the enhancement for obstruction of justice. The court found that the enhancement was applicable in this case and accepted the findings of the PR with respect to the enhancement. The court found that the defendant gave false testimony concerning several material matters and that he did so willfully. The court reviewed the transcript of the defendant's testimony provided by the government and also took its own recollection of the testimony noting that it was struck at the time by the fact the

defendant denied any drug-related activity at Eggs and Things and that he continued to deny his own involvement in any drug dealings or relationships that occurred within the restaurant. He denied involvement with Detective Boles which, in the court's opinion, was also false testimony. The court found that all of his false testimony related to material matters which were the very basis on which the prosecution was founded. The court found that the defendant was willful in presenting false testimony to the jury. The court allowed the two-level upward adjustment for obstruction of justice as set forth in paragraph 30 of the PR.

The defendant objected to the four-level upward adjustment for role in the offense. The court found, based on all the evidence, that an adjustment under U.S.S.G. § 3B1.1(b) would be appropriate as the defendant was a manager or supervisor and not an organizer or a leader. The court found that this was a loose association of dealers and that defendant did exert managerial or supervisory authority or was in a managerial or supervisory position concerning what went on within his restaurant. The court made an upward adjustment of three instead of four levels.

Based on the adjustments made by the court, the court found that the total offense level was 37 instead of 40.

APPENDIX B.

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 96-1319

UNITED STATES,
Appellee,
v.
MICHAEL KREMETIS,
Defendant-Appellant.

JUDGMENT

Entered: September 19, 1996

This cause came on to be heard on appeal from the United States District Court for the District of New Hampshire, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By The Court

WILLIAM H. NG

Clerk.

[cc: Mr. Haley and Ms. Weld]

APPENDIX C.

[NOT FOR PUBLICATION]

United States Court of Appeals
For the First Circuit

No. 96-1319

UNITED STATES OF AMERICA,
Appellee
v.
MICHAEL KREMETIS,
Defendant, Appellant,

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE
[Hon. Joseph A. DiClerico, U.S. District Judge]

Before
Boudin, Circuit Judge,
Aldrich, Senior Circuit Judge,
and Lynch, Circuit Judge.

Paul J. Haley for appellant.

Jean B. Weld, Assistant United States Attorney, with whom Paul M. Gagnon, United States Attorney, was on brief for appellee.

September 19, 1996

LYNCH, Circuit Judge. Michael Kremetis owns the Eggs and Things restaurant in Manchester, New Hampshire. Among the "Things" sold there were rocks of cocaine base. At least three cocaine dealers plied their wares from the restaurant. Kremetis was convicted of conspiring with the drug dealers to distribute and to possess with intent to distribute cocaine and cocaine base, in violation of 21 U.S.C. § 846. He was acquitted on one count asserting a drug conspiracy with an alleged fourth dealer.

Kremetis appeals his conviction, saying the federal drug crime statutes under which he was charged violate the Commerce Clause, under the holding of United States v. Lopez, ___ U.S. ___, 115 S. Ct. 1624 (1995), and that, in any event, the evidence is insufficient to support the conviction. He also appeals his sentence on three grounds: that the amount of cocaine attributed to him was excessive, that he was not a manager in the conspiracy and thus could not be given a three-level enhancement, and that the two-level enhancement he received for giving false testimony was erroneous. We affirm.

Constitutionality of Statutes

The attack that Kremetis makes on the statutes under which he was charged is foreclosed by the decision of this court in United States v. Lerebours, 87 F.3d 582 (1st Cir. 1996). Kremetis argues that Congress exceeded its power when it promulgated 21 U.S.C. §§ 841(a) (1) and 846, part of the Comprehensive Drug Abuse Prevention and Control Act of 1970 ("the Drug Act").[1] Basing his claim on the Supreme

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[1] 21 U.S.C. § 841(a) (1) provides that it is unlawful "to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance. . . ." 21 U.S.C. § 846 provides that "[a]ny person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

Court's decision in Lopez, Kremetis maintains that federal regulation of the distribution and possession of drugs under these Drug Act provisions violates the Commerce Clause because neither statute pertains to activities that substantially affect interstate commerce.

In Lerebours, this court rejected the challenges to these statutes presented here and joined three other courts of appeals in upholding the constitutionality of these Drug Act provisions. Lerebours, 87 F.3d at 584-85 (citing United States v. Brown, 72 F.3d 96 (8th Cir. 1995), cert. denied, ___ U.S. ___, 116 S. Ct. 2581 (1996); United States v. Wacker, 72 F.3d 1453 (10th Cir. 1995); and United States v. Leshuk, 65 F.3d 1105 (4th Cir. 1995)). The challenge here fares no better.

Kremetis also makes a related jurisdictional argument against his conviction. He asserts that by invoking jurisdiction in this case, the district court improperly undercut the jurisdiction and authority of the State of New Hampshire because that state already criminalizes both conspiracy to distribute and conspiracy to possess with intent to distribute cocaine and crack cocaine. As we reiterated in Lerebours, Congress does not abridge the reservation of police powers to the states where, as in this instance, Congress was within its powers under the Commerce Clause to criminalize certain conduct. Lerebours, 87 F.3d at 585 (citing United States v. Owens, 996 F.2d 59, 60-61 (5th Cir. 1993)). Thus, the district court properly invoked jurisdiction over Kremetis based on his alleged Drug Act violations.

Sufficiency of the Evidence

The transcript belies the picture that Kremetis paints in his brief of being an innocent owner of a restaurant whose only failing was that he did not object to the independent activities of the drug dealers who frequented his place. In sufficiency of

evidence challenges, evidence is reviewed "in the light most compatible with the verdict resolv[ing] all credibility disputes in the verdict's favor, and then reach[ing] a judgment about whether a rational jury could find guilt beyond a reasonable doubt." United States v. Taylor, 54 F.3d 967, 974 (1st Cir. 1995) Applying that standard, defendant's sufficiency challenge falls short. See United States v. Valle, 72 F.3d 210, 216 (1st Cir. 1995) ("If the evidence presented, taken in the light most agreeable to the government, is adequate to permit a rational jury to find each essential element of the offense of conviction beyond a reasonable doubt, then the defendant's claim fails.").

The jury would have been amply justified in finding that Kremetis was an active member of the drug conspiracies and was paid by the dealers for his involvement. Kremetis introduced the undercover agent and other buyers to the dealers when they said they wanted to buy cocaine; Kremetis negotiated the terms of some deals, including the quantities of drugs and the prices; Kremetis knew the quantities of drugs the dealers had available; Kremetis indicated he could get the drugs for the agent in the future "for a better price"; Kremetis indicated to the drug dealers when it was acceptable for them to deal; and Kremetis attempted to safeguard the drug deals from police notice. Kremetis also said that he made more profit from many sales of small quantities of drugs than from fewer sales of larger quantities. One dealer refused to discuss the sale of drugs in Kremetis's absence. Kremetis once boasted, "My name is golden with the dealers around here," and even acknowledged, "Because I know what's going on here and I allow it, I could go to jail, too." This was not, as Kremetis argues, an example of his merely being present while others engaged in drug dealing. It was, as the government says, a situation where Kremetis offered "take-out" drug service from his restaurant. The government presented

sufficient evidence of Kremetis's knowing and willful participation in this drug dealing scheme. See United States v. Valerio, 48 F.3d 58, 64 (1st Cir. 1995). Kremetis's conviction stands.

Sentencing

Drug Quantity Computation

"In drug-trafficking cases under the sentencing guidelines, sentences are largely quantity-driven.," United States v. Sepulveda, 15 F.3d 1161, 1196 (1st Cir. 1993), cert, denied, ___ U.S. ___, 114 S. Ct. 2714 (1994). The district court found by a preponderance of the evidence, see United States v. Jimenez Martinez, 83 F.3d 488, 497 (1st Cir. 1996), that the relevant drug quantity computation was between 50 and 150 grams of cocaine base. This court accepts the factual finding of the district court unless it is shown to be clearly erroneous. United States v. Akitoye, 923 F.2d 221, 229 (1st Cir. 1990). The computation was not erroneous.

The trial court assigned a Base Offense Level ("BOL") of 32 based on its drug quantity computation. That computation had two components: some 15 grams which the three drug dealers sold directly to the undercover agent at Eggs and Things, and an additional amount of approximately 42 grams, based on testimony of co-conspirator Luis Colon and other witnesses about sales made over the time period in question. Specifically, Colon testified that he sold 30 to 35 rocks nearly every day at Eggs and Things throughout April and May, 1995. As each rock weighed .2 grams, the daily total Colon sold in the restaurant equaled 6 to 7 grams, or at least 42 grams per week. These sales were the subject of other testimony and of Count V of the original indictment and were

"part of the same course of conduct or common scheme or plan as the offense of conviction. 11 U.S.S.G. § 1B1.3(a)(2). This was a conservative computation, supported by the sales of only one of the conspirators and over only one week. As such, the computation adequately supports the district court's conclusions. See United States v. Sklar, 920 F.2d 107, 112-14 (1st Cir. 1990).

Role in the Offense

The district court adjusted the BOL upward by three levels based on its finding that Kremetis was a manager or supervisor in the conspiracy.[2] See U.S.S.G. § 3B1.1(b) There is no dispute that more than five participants were involved in the criminal conspiracy. The question raised is whether Kremetis fell within the definition of a "manager" or "supervisor." Kremetis, spinning off from the undercover agent's testimony on redirect that Kremetis was directing traffic, argues that he was no more than a traffic cop. The record reflects, in addition to the evidence recited earlier, that Kremetis told dealers to go get the drugs to give to the agent and to exchange pager numbers with the agent. The dealers in turn would, on occasion, refuse to deal unless Kremetis was present or had approved. Kremetis told the agent to buy from one dealer "today, and starting Monday you buy from [a different dealer]." The conclusion that Kremetis was supervising or managing the dealers was easily drawn. Kremetis's activity places him well within the definition of managerial status set forth in United States v. Cali, 87 F.3d 571, 578-79 (1st Cir. 1996).

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[2] The court rejected the recommendation in the Presentence Report that Kremetis be given a four-level increase as a leader.

Obstruction of Justice

Finding that Kremetis had given false testimony "related to material matters which were the very basis on which the prosecution was founded," the district court increased the BOL by two levels. As a matter of law, the enhancement applies when a defendant commits, suborns, or attempts to suborn perjury. U.S.S.G. § 3C1.1; see United States v. Matiz, 14 F.3d 79, 83-84 (1st Cir. 1994).

Kremetis argues that the district court failed to support its ruling that his trial testimony was false. Specifically, Kremetis argues that his denial of any involvement in drug dealing does not automatically result in a finding of perjury. He suggests that if such logic were applied to the testimony of the undercover agent, the agent would also be lying since the jury acquitted Kremetis of charges involving a fourth drug dealer, presumably rejecting the agent's testimony regarding Kremetis's involvement with that drug dealer. The flaw in this position is that Kremetis's convictions show that the jury believed the agent's testimony as to the first three dealers and so convicted. That supports the enhancement. Matiz, 14 F.3d at 84. Kremetis denied under oath that he discussed the price of drugs with the agent, that he was ever given money from drug dealers for drug-selling privileges, and that he conspired with the dealers to sell drugs. He testified that he was not even present several times when the agent talked to him about drugs. The district court was not required to accept Kremetis's testimony over that of the agent, and Kremetis misreads application note 1 to U.S.S.G. § 3C1.1 in suggesting that it was. See United States v. Clark, 84 F.3d 506, 509-10 (1st Cir. 1996), petition for cert. filed, ___ U.S.L.W. ___ (U.S. Aug. 28, 1996) (No. 96-5776) . There was no error in the finding of false testimony and in the enhancement. See Akitoye, 923 F.2d at 229.

Affirmed.

APPENDIX D.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 96-1319

UNITED STATES,
Appellee,

v.

MICHAEL KREMETIS,
Defendant-Appellant.

BEFORE

TORRUELLA, CHIEF JUDGE,
ALDRICH, SENIOR CIRCUIT JUDGE,
SELYA, BOUDIN AND STAHL, CIRCUIT JUDGES.

ORDER OF COURT

Entered: June 27, 1997

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the court in regular active service and a majority of said judges not having voted

to order that the appeal be heard or reheard by the court en banc,

It is ordered that, without addressing the request to file late, the court denies the petition for rehearing and suggestion for rehearing en banc on its merits.

By the Court:
WILLIAM H. NG
Clerk

[cc: Messrs. Denner and Ms. Weld]